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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. _____

CARLOS L. JIMENA, Petitioner,

v.

BOARD OF REVIEW OF THE UTAH INDUSTRIAL COMMISSION AND UTAH DEPARTMENT OF EMPLOYMENT SECURITY, Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UTAH STATE SUPREME COURT IN CASE NO. 18901

CARLOS L. JIMENA
Petitioner
P.O. Box 1304
Portland, Oregon 97207

Counsel in his own behalf

QUESTIONS PRESENTED

1. Whether a state agency in Utah can compel an out of state resident and citizen of Oregon to submit to a telephonic hearing without violating the latter's right to due process guaranteed by the 14th Amendment of the U.S. Constitution and without violating the territorial integrity and sovereignty of Oregon.

2. Whether it is the U.S. District Court in Portland, Oregon or the Utah Supreme Court which has jurisdiction over the person of the petitioner and the subject matter in this case.

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PETITION FOR WRIT OF CERTIORARI

The petitioner Carlos L. Jimena respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Utah State Supreme Court entered in this proceeding on May 11. 1983.

OPINION BELOW

The opinion of the Utah Supreme Court appears in Appendix A1 hereto which affirmed the opinion of the Board of Review of the Utah Industrial Commission .(Appendix A2-8) In brief the Court below and the Utah Board of Review were of the opinion that interstate telephonic hearing does not violate petitioner's right to due process guaranteed by the 14th Amendment of the U.S. Constitution, does not violate the territorial integrity and sovereignty of Oregon and both have jurisdiction over the person of petitioner and the subject matter in this case.

JURISDICTION

The judgment of the Utah Supreme Court was entered on May 11, 1983. This petition for certiorari was filed within 90 days from that date.

This Court's jurisdiction is invoked under 28 U.S.C. &1257(3).

QUESTIONS PRESENTED

1. Whether a state agency in Utah can compel an out of state resident and citizen of Oregon to submit to a telephonic hearing without violating the latter's right to due process guaranteed by the 14th Amendment of the U.S. Constitution and without violating the territorial integrity and sovereignty of Oregon.

2. Whether it is the U.S. District Court in Portland, Oregon or the Utah Supreme Court which has jurisdiction over the person of the petitioner and the subject matter in this case.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment, Art. XIV, Sec. 1:

> "xxx or shall any State deprive any person of life, liberty, or property without due process of law;xxx"

Amendment, Art. X:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to States respectively, or to the people."

FEDERAL LAWS INVOLVED

United States Code, Title 26, Sec. 3304(a)(9)(A):

"compensation shall not be denied or reduced to an individual solely because he files a claim in another state (or xxx) or because he resides in another state (orxxx) at the time he files a claim for unemployment compensation:"

United States Code, Title 28 Sec. 1343(a):

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

xxx

(3) To redress the deprivation, under color of any State law, statute, ordinance regulation, custom, usage, of any right, privilege or immunity secured by the Constitution of the United States or by any act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States." (underscoring mine)

STATE LAW INVOLVED

Utah Employment Security Act, Sec. 35-4-22, (m) (1):

"An individual is deemed 'unemployed' in any week during which he performs no services and with respect to which no wages are payable to him or in any week of less than full-time work if the wages payable to him with respect to such week are less than his weekly benefit amount."

STATEMENT OF THE CASE

From February 7, 1982 until July 31, 1982 petitioner received unemployment compensation benefits from the Utah Department of Employment Security, hereinafter referred to as the Employment Security. Later petitioner obtained a private investigator's license

from the City of Medford, Oregon covering the period of July 29, 1982 to December 31, 1982 and another license from the City of Portland, Oregon covering the period August 26. 1982 to December 31, 1982. (R 0056) Beginning August 1, 1982 the Employment Security Representative denied benefits to petitioner (R.0069) based on his claim report for the weeks ended August 7 and 14, 1982 (R.0073) where he reported his activites as follows:

8/2/82- petitioner sought customers by publishing an advertisement in the Mail Tribune, Medford, Oregon
8/3/82- petitioner sent a letter of application as notary public to the Governor of Oregon
8/4/82- same as 8/2/82
8/5/82- Hired Michael Simonsen to distribute leaflets of advertisement
8/6/82- Hired Scott Lucas to distribute leaflets of advertisement
8/9/82- Advertised business for three weeks in Pennysaver
8/10/82- solicit customers by calling law offices in Medford, Oregon
8/11/82- same as 8/9 /82
8/12/82- same as 8/9/82
8/13/82- Hired Scott Lucas to distribute leaflets of advertisement

The Employment Security Representative applying to the above facts Sec. 35-4-22, m,1, quoted on page 3 hereof denied benefits to petitioner.

The representative referred the claim to the Appeal Referee who on September 23, 1982 affirmed the former's decision without holding any hearing. (R.0064) Against the latter decision petitioner appealed to the Board of Review contesting the decision on the ground that under Sec. 35-4-22,m,1, Utah Employment Security Act (quoted on p. 3 hereof) petitioner should be considered unemployed because based on his activities consisting of client solicitations (p. 4 hereof) he performed no service to a client and hence no wages were payable to him.(R.0052) Because of the failure of the Appeal Referee to conduct an initial hearing, the Board of Review issued a decision on October 26, 1982 remanding the case for a full hearing on the issue of whether petitioner is not unemployed under Sec. 35-4-22,m,1, Utah Employment Security Act. (R. 0042) Based on this decision the Appeal Referee set the case for initial hearing on November 12, 1982 where he will receive the evidence of petitioner, both testimonial and

documentary, by telephone in petitioner's Oregon residence. (R.0040) Before this date, on November 7, 1982 petitioner objected to the telephone hearing because of the difficulty of presenting testimonial and documentary evidence and hence violative of the due process clause of the 14th Amendment of the U.S. Constitution; petitioner further objected on the basis that the Utah Appeal Referee cannot acquire jurisdiction over his person in Oregon and the claim or subject matter: since at this point the constitutionality of the telephone hearing came out in issue, the case falls within the jurisdiction of the U.S. District Court of Portland, Oregon under Title 28 U.S.C. Sec. 1343(a) quoted on page 3 hereof(par.6-9,R.0029-31) as it always should. (26 U.S.C.&3304,a,9,A)

The penalty for petitioner's objection and failure to participate on the November 12, 1982 telephone hearing on constitutional and jurisdictional grounds was met by another decision of denial of unemployment compensation benefits when the Appeal Referee merely reiterated his former decision.(R.0037) For the

second time petitioner appealed to the Board of Review raising the same constitutional due process and jurisdiction issues. (par. 3,4, R.0024, par. 9-10, R.0026, par. 12, R.0027, R.0028) On December 14, 1982 the Utah Board of Review in its decision upheld the consitutionality and not in violation of due process the telephone hearing and ruled that it has jurisdiction over petitioner and subject matter of this case; it found that petitioner refused to participate in the telephonic hearing on constitutional and jurisdictional grounds and penalized petitioner by denying unemployment compensation benefits.(R.0018-20, Appendix A2-A8) Against the latter decision, petitioner filed a petition for review before the Utah Supreme Court raising the same constitutional and jurisdiction issue. (par. 5.1, 5.3, R.0003, par. 5.4, R.0004) On May 11, 1983 the Utah Supreme Court, after accepting the brief of respondents which was filed out of time (see p.22 hereof), affirmed the Board's decision (Appendix A2-8) but ordered the

non-publication of its decision. The latter decision is now the subject of the present petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER FEDERAL COURT OF APPEALS, OTHER STATE SUPREME COURT, ITS OWN PRECEDENT, AND THE DECISION AND DOCTRINAIRE PRINCIPLE ANNOUNCED BY THIS COURT.

The decision below upheld as constitutional and not in violation of due process the telephonic hearing conducted in the office of the Appeal Referee in Utah over petitioner, a claimant citizen and resident of Oregon, who is ordered to be in his own home telephone in Oregon at a specific time to attend the hearing, disobedience of which would result in denial of unemployment compensation. Petitioner failed to do so; hence, his unemployment compensation was denied. (Appendix A2 - A8) The Utah Board of Review as affirmed by the Utah Supreme Court relied on the cases of Slattery v. Unemployment Insurance Appeals Board, 60 Cal.App. 3d 245 (1976) decided by the California Court of Appeals and Greenburg

v. Simms Merchant Police Service, 410 So. 2d 566 (1982) decided by the District Court of Appeals of Florida. The latter two cases conflict with the decision of the District Court of Columbia Court of Appeals in the case of Raymond G. Simmons v. District Unemployment Compensation Board, 292 A. 2d 797,800,(1972) District of Columbia Court of Appeals in the case of Feldman v. Board of Pharmacy of District of Columbia 160 A.2d 100, 103 (1960), the State Supreme Court of Wisconsin in Shawley v. Industrial Comm.(1962),16 Wis 2d 535, 114 N.W. 2d 872, 875-876, the U.S. Court of Appeals in Gamble-Skogmo Inc. v. FTC, 211 F. 2d 106, 115 (8th Cir. 1954), the U.S. Court of Appeals in District Court of Columbia v. Feldman, 108 U.S. App. D.C. 46, 279 F. 2d 821 (1960) where in those cases it was held that fairness requires that the demeanor of a witness should be considered, otherwise, due process is lacking as guaranteed under the 14th Amendment of the U.S. Constitution. It is obvious that the Appeal Referee in Utah cannot

observe the demeanor of the witness testifying over the telephone in Oregon.

The decision of the Court below is contrary to the principle announced in its own case, Crow v. Industrial Commission of Utah, 140 P. 2d 321, 322 (1943) which is quoted as follows:

> "Only a person who actually hears and sees a witness while testifying is in a position to determine the weight or credibility which should be given to such testimony." (cited by the Supreme Court of Wisconsin in Shawley v. Ind. Com., supra, p. 876) (underscoring mine)

The decision of the Court below is in conflict with the doctrine announced by this Court in Morgan v. United States, 298 U.S. 468, 481, 56 S.Ct. 906, 912, 80 L. Ed. 1288 (1936) where it was held that "the one who decides must hear." Obviously, this means that the hearing officer must be able to see the demeanor of witnesses so as to be able to tell whether the witness is telling the truth.

The decision below runs counter to the decision and doctrine announced by this Court in Pennoyer v. Neff, 95 U.S. 714 (1877) where it was held:

"The authority of every tribunal is necessarily restricted by the territorial limits of the state in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, an illegitimate assumption of power and be resisted as mere abuse." (p. 720) (underscoring mine)

"Process from the tribunals of one state cannot run into another state and summon parties there domiciled to leave its territory and respond to proceedings against them." (Pennoyer v. Neff, supra, p. 727 (1877)

The above doctrine finds basis under the Tenth Amendment of the U.S. Constitution quoted on page 2 hereof. Thus if it is true as found by the Court below that petitioner refused to participate in a hearing conducted in Utah whose presence was in Oregon, it is for the reason that the coercive power of the Appeal Referee in Utah cannot extend beyond the boundaries of Utah and reach petitioner, a resident and citizen of Oregon, by means of a telephone and compel him to submit to a Utah hearing. Petitioner's objection and resistance to that coercive power was met with and was used as basis for denying his claim for unemployment compensation. This must be overturned.

The Appeal Referee in Utah in extending

his arm in Oregon violated the territorial integrity and sovereignty of Oregon as preserved by the Tenth Amendment, U.S. Consitution.

The Appeal Referee in Utah cannot assume jurisdiction over the person of an out of state citizen and resident who objects to the exercise of his coercive power. He must resort to other means by either utilizing the powers of the State of Oregon or the federal court. It is for this reason that states should have reciprocal agreements in hearing unemployment compensation cases. Unfortunately, Utah and Oregon do not have that.

In upholding the constitutionality of telephonic hearing, the Court below relied on two major cases: Slattery v. California Unemployment Ins. Appeals Board (1976) 60 Cal. App. 3d 245, 131 Cal. Rptr. 422, decided by the California Court of Appeals and Greenburg v. Simms Merchants Police Service, 410 So. 2d 566 (1982) decided by the Florida District Court of Appeals.

An analysis of the two cases fails to

support the ruling of the Board of Review. The decision of the Floria District Court of Appeals relied basically on the fact that the issue of telephonic hearing as violative of due process was not raised at the first opportunity but was raised for the first time on appeal. (Slattery case, supra,p. 567)

Hence statements by the court in Greenburg case justifying telephone hearing was of secondary weight because the court did not choose to rests its decision squarely on them,

The weakness of the Greenburg case as authority is shown further by relying on the Slattery case. The latter case does not support the former because the facts are different and neither the claimant nor respondent raised the issue of whether telephonic hearing violates due process so that statements made by the court concerning a telephone hearing are mere obiter dictum or not controlling in the case.

Factual differences. In the Slattery case, the telephone hearing was within the State of California, one party in Eureka and the other

in Los Angeles. No party was an out of state resident. It did not concern an interstate claim. In the Greenburg case, claimant was an out of state resident and the telephone hearing reached out of state. It dealt with an interstate claim. The Slattery case did not involve the sovereignty of another state so that no conflicts of laws rule operated. In the Greenburg case, as it is in the instant case, the sovereignty and territorial integrity of another state was involved which should have applied a conflict of laws rule.

The factual differences between the Slattery and Greenburg cases calls for the application of different principles. An interstate claim should be differentiated from one that is not.

When the constitutionality of telephonic hearing arose as an issue before the Appeal Referee in Utah, the jurisdiction of the U.S. District Court of Portland,(Or)came more into play. The latter court has original jurisdiction to decide the constitutional issue under Title 28 U.S.C. Sec. 1343(a) quoted on page 3

hereof and the rest of the issues goes with it.

The Utah Supreme Court abused its discretion in not declining jurisdiction (if ever it has jurisdiction) in this case and instead should have ordered the records forwarded to the U.S. District Court of Portland, Oregon where petitioner resides and can pay the filing fee and the case considered originally filed following the doctrine of forum non conveniens announced by this Court in the case of Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 504, 507-8 (1947). When the petitioner urged the lower court to do so but it refused, the refusal runs counter to the doctrine of forum non conveniens enunciated by this Court.

"(4) A conflict between decisions of a highest state court and a federal court of appeals on a question of federal law is ground for granting review of either decision. See Katzinger v. Chicago Metalic Mfg. Co. 329 U.S. 394, and MacGregor v. Westinghouse Co. 329 U.S. 402.

(5) A conflict between a decision of the highest state court and that of the Supreme Court on a matter of federal law is a strong reason for the granting of certiorari. See William E. Arnold Co. v. Parking Corp. 417 U.S. 12, 14 (1974) Pittsburgh v. Alco 417 U.S. 369-72

(6) A conflict between decisions of the highest courts of two or more states on a federal question is also a valid ground for Supreme

Court review. xxx (United States v. Oregon, 366 U.S. 643, 645; Citizens & Southern National Bank v. Bougas, 434 U.S. 35)xxx

xxx

(8) Where a state court has decided a substantial and unsettled federal question arising under the Constitution or where it has rendered an erroneous or at least a doubtful decision on such a question, the Supreme Court frequently grants the petition for a writ of certiorari despite the absence of a conflict, (See Pernell v. Southall Realty, 416 U.S. 363, 365; Davis v. Alaska, 415 U.S. 308, 315; Zacchini v. Scripps-Howard Broadcasting Co. 433 U.S. 562, 565; Rice v. Sioux City Cemetery 349 U.S. 70.)" Stern & Gressman, Supreme Court Practice, 5th ed., p. 316)

II. THE DECISION OF THE COURT BELOW CONFLICTS WITH THE DECISION OF ANOTHER FEDERAL COURT OF APPEALS WHICH HAS A DIFFERENT APPROACH AND SOLUTION TO THE PROCEDURAL PROBLEM.

It was held by the U.S. Court of Appeals in Barr v. U.S. et. al. 478 F. 2d 1152, 1156 (1973) that in interstate appeals procedure concerning unemployment compensation cases Title 26 U.S.C. Sec. 3304(a)(9)(A)quoted on page 3 hereof, it "permitted only the taking of testimony and transmitting the same to the state against which the claim was asserted." If this ruling is to be followed in this case, then the Court below should have ordered that instead of an interstate telephonic hearing,

petitioner's claim should be heard by the Appeals Referee of the Employment Division, State of Oregon who has the opportunity of observing the demeanor of petitioner while testifying and other witnesses. After taking the evidence and testimony he then should forward the record to the state liable for unemployment compensation, the State of Utah for the issuance of the appropriate order. At this point the case of Simmons v. District Unemployment Compensation Board,292 A.2d 297,800(1972) footnote 4, decided by the District of Columbia Court of Appeals held that the Appeal Referee taking the evidence out of state (in Oregon) should likewise make findings of facts and conclusions of law.

III. THE DECISION OF THE COURT BELOW RELIED ON FEDERAL LAW GROUNDS, RATHER THAN ON STATE LAW GROUNDS, IN DENYING UNEMPLOYMENT COMPENSATION TO PETITIONER.

Sec. 35-4-22(m)(1), Utah Employment Security Act defines "unemployed" as quoted on page 3 hereof. Under that definition there are two elements to look into: (1) Did the individual perform service? (2) Was he paid or to

be paid wages for that service?

Applying the aforequoted state law to petitioner's activities consisting of client solicitation for the weeks ended August 7 and 14, 1982 as stated on page 4 hereof would show the erroneousness of the Board of Review's decision as adopted by the Utah Supreme Court.

The first element of the law is did petitioner perform services to a client? The question cannot be that petitioner performed service to himself because he does not pay wages to himself. His wages or earnings come from the client.

During the two weeks period of activity as recited on page 4 hereof (R.0073) petitioner did no service to a client because there was no client to serve yet. Those are acts of solicitation for a client that do not occupy the time of petitioner eight hours a day. Seven to eight hours a day petitioner is idle when there is no client as he never did have a client for the weeks ended August 7 and 14, 1982. Hence the first element of the state

law as applied to the facts is absent and the denial of benefits under the above law is incorrect.

Now let us go to the second element of the law. Was petitioner paid or to be paid wages for his services as private investigator? The answer is no again because there was no client who would pay him remuneration.

The law as applied to the facts show that petitioner is unemployed. If there is any doubt as to the interpretation of the law, the doubt is resolved in favor of the employee or worker.

> "Doubts should be resolved in favor of the coverage of the employee." (Johnson v. Board of Review (1958) 320 P. 2d 315, 318)

Petitioner argued this matter before the Utah Supreme Court, pp. 6-8 of his Reply to Respondent's Brief, but it was disregarded because despite the correctness of petitioner's argument, the decision of the Utah Board could stand mainly on federal law grounds, i.e. petitioner refused to participate in the telephonic hearing which was held constitutional

and not in violation of due process. To quote the Board of Review:

"In the face of such conflicting evidence, the Appeal Referee and the Board of Review are not compelled to act upon plaintiff's unsworn claim forms in view of the fact that many questions could have been answered had the plaintiff seen fit to appear at the hearing." (p. A7 , Appendix hereof) (underscoring mine)

Ergo, petitioner stands to suffer the consequences by asserting his rights under the U.S. Constitution.

Please note that the decision of the Board of Review is conflicting. At the first paragraph of the decision (Appendix A2 hereof) it found the petitioner not unemployed . At the last paragraph of the decision as quoted above, it found the evidence "conflicting" and great reliance for denying unemployment compensation was placed on petitioner's refusal to participate in the interstate hearing (to clarify the alleged conflict) based on constitutional and jurisdictional grounds. In either way, the decision is wrong.

IV. THE ISSUE OF THE CONSTITUTIONALITY OF INTERSTATE TELEPHONIC HEARING AS VIOLATIVE OF DUE PROCESS IS A QUESTION OF FIRST IMPRESSION BEFORE THIS COURT.

No case decided by this Court can be found which upholds or turns down the constitutionality of interstate telephonic hearing. This issue is presented for the first time before this Court which is a good reason for giving due course to the instant petition.

V. THE COURT BELOW WAS BIASED AND PREJUDICED IN ITS PROCEEDINGS. IT ABUSED ITS POWERS WHICH ONLY THIS U.S. SUPREME COURT CAN CORRECT.

Petitioner is an out of stater, an Oregonian, while respondents are in Utah. There is therefore diversity in this case. The warning by some writers that the reason for the diversity rule is because of the bias and prejudice against out of state litigants came true in this case. (Wright,Miller,Cooper, Federal Practice and Procedure, Vol. 13, 1975, p. 574 citing cases)

In the proceedings before the Utah Supreme Court, respondents last day for filing their brief was March 18, 1983. Attorneys for respondents incorrectly computed their last day for filing to be on March 21, 1983. On the latter date, they filed a motion for extension

of time.(Appendix A9)On March 23, 1983 petitioner filed an opposition to that motion for extension of time (Appendix A10)because there was no more time to extend. Strangely enough, contrary to its rules, the Utah Supreme Court still granted respondents motion for extension of time.(Apndix.A14) This is a clear evidence of bias and prejudice against an out of state litigant.

Again when the decision of the Court below was rendered, it ordered its decision "not for publication." Why? So that its decision will not serve as a precedent for other states to follow? If its decision is good law, let every American know about it. Petitioner is not ashamed nor is he afraid that the facts of this case be published. Petitioner is not asshamed for every American to know that he left his job because he was discriminated by the Mormons which is the reason for placing him under unemployment compensation from February to July 1982.(par. 1,R.0029) We cannot hide the truth and there is nothing to hide.

The Court below abused its power by ordering its decision not to be published as if there is something to hide. Publication of a decision is the only assurance to the American people that a public duty was well done.

By way of closing, interstate telephonic hearing cannot be sustained on practical grounds because (1) the hearing officer does not see who is the other person at the end of the telephone line; he cannot identify him if he is the claimant or not; (2) the witness may be reading his testimony from a prepared transcript but the hearing officer does not know about that because he does not see the witness. Hence, telephonic hearing opens the door to fraudulent claims.

CONCLUSION

FOR ALL THE FOREGOING REASONS, it is respectfully prayed that a writ of certiorari issue to review the judgment and opinion of the Utah State Supreme Court affirming the decision of the Board of Review, Utah Industrial Commission. Other equitable relief is

praved for.

Respectfully Submitted,

Carlos L. Jimena

CARLOS L. JIMENA
Petitioner
P.O. Box 1304
Portland, Oregon 97207

Counsel in his own behalf

June 8, 1983

Proof of Service

I hereby certify that on this 8th day of June, 1983, three copies of the Petition for certiorari were mailed, postage prepaid, to David L. Wilkinson, Utah Attorney General, thru his Special Assistant, K. Allan Zabel, 174 Social Hall Avenue, Salt Lake City, Utah 84147, Counsel for Respondents. I further certify that all parties required to be served have been served.

Carlos L. Jimena

CARLOS L. JIMENA
Petitioner, Pro Se
P.O. Box 1304
Portland, Oregon 97207

Appendix

IN THE SUPREME COURT OF THE STATE OF UTAH

Carlos L. Jimena,
Plaintiff-Appellant,

v

Department of Employment Security,
Defendant-Respondent.

No. 18901

F I L E D

May 11, 1983

Geoffrey J. Butler,
Clerk

Stewart, Justice:

This case is here on a petition for review of an order of the Board of Review of the Industrial Commission denying unemployment benefits to petitioner. Numerous issues are raised by petitioner. To the extent that the issues raised are not frivolous, they have been adequately dealt with by the opinion of the Board of Review.

We affirm the order of the Board of Re-Biew. No costs.

Not for publication.

WE CONCUR:

Gordon R. Hall, Chief Justice

Dallin H. Oaks, Justice

Richard C. Howe, Justice

Christine M. Durham, Justice

BOARD OF REVIEW
The Industrial Commission of Utah
Unemployment Compensation Appeals

CARLOS L. JIMENA
S.S.A. No. 553 39 3140

Case No. 82-A-3888

DECISION

vs.

Case No. 82-BR-461

DEPARTMENT OF EMPLOYMENT SECURITY.

After careful consideration of the record and testimony in the above-entitled matter, the Board of Review hereby affirms the decision of the Appeal Referee which denied benefits to the claimant effective August 1, 1982, pursuant to Section 35-4-22(m)(1) of the Utah Employment Security Act, on the grounds the claimant is not considered unemployed.

In affirming the decision of the Appeal Referee, the Board of Review notes that the claimant refused to participate in a hearing with the Appeal Referee on the basis that a telephone hearing does not meet the requirements of due process. Prior to the use of the telephone for unemployment insurance hearings, claimants who resided outside the boundaries

of the state from which benefits were being paid were compelled to participate in a hearing before the Referee of their state of residence who was not versed in the law of the liable state and, therefore, could not render a decision in the matter. Thus, the case was heard by an administrative law judge, or other hearing officer, in one state and decided by a hearing officer in another state. If more than one party participated in a hearing such as the claimant in one state and the employer in another state, each party was allowed to testify independently of the other and cross-examination was not possible. The telephone hearing concept came about as a response to the due process problems of the bifurcated hearing.

Due process requires a trial-type hearing on disputed adjudicative facts except when other methods of ascertaining the facts may be better, or when a cost benefit analysis establishes that a trial procedure is outweighed by its deprivation. Davis, Administrative Law

Treatise, Vol. 2, 2d Edition (1976, Chap. 12.1, P.406.) The protection of due process in administrative law necessarily involves the weighing of three factors:1) the private interest of the individual; 2) the risk of erroneous deprivation or loss of rights through the procedure used, as related to the probable value, if any, of additional or substitute procedural safeguards; and 3) the government interest involved, including the fiscal and administrative burdens that additional or substitute procedural requirements would impose on the government. Matthews v. Eldridge, 424 U.S. 319 (1976). Several courts in the nation have had an opportunity to deal with this question and have almost unanimously held that telephonic hearings in unemployment insurance cases meet the requirements of due process; Slattery v. California Unemployment Insurance Appeals Board, 60 Cal. App. 3d 245, 131 Cal. Rptr. 422; Greenberg v. Simms Merchant Police Service, 410 So. 2d 566 (1982); Okitkun v. Orbeck, 3d Judicial District Super-

ior Court, Alaska, Case No. 76-8627, decided and filed August 18, 1978; in re Maxine White Bull, Memorandum Opinion, Case No. 499, So. Central Judicial District Court for North Dakota, decided September 2, 1981. Therefore, this Board concludes that the claimant's objection to a telephone hearing is not supportable in law and his failure to participate in the hearing is without good cause.

The Appeal Referee issued a decision affirming the original denial of benefits and the claimant appealed to the Board of Review. After reviewing the matter, the Board of Review remanded the case to the Appeal Referee for a new hearing, explaining that the issue of self-employment often involves complex factual determinations and that the Department of Employment Security is entitled to interview the claimant under oath to determine the validity of any factual assertions which he has made concerning the issue. The claimant again objected to the remand of the matter to the Appeal Referee and refused to participate

in a second hearing, filing an objection to venue, jurisdiction, procedure and motion to forward the entire records of the case to the U.S. District Court of Portland, Oregon. This Board of Review holds that the District Court of Portland is not a proper court of jurisdiction in this matter and that the Department of Employment Security has jurisdiction of the claim for benefits pursuant to Sections 35-4-6 and 35-4-10 of the Utah Employment Security Act, subject to final judicial determination in the Supreme Court of the State of Utah.

Inasmuch as the claimant has now had ample opportunity to present his case to the Appeal Referee, the Board of Review herewith affirms the decision of the Appeal Referee, noting that the only evidence supporting plaintiff's claim for benefits are his weekly claim forms, Forms IB-2, for the weeks ended August 7 through August 28, 1982 on which the claimant has reported various employer contacts. This evidence, however, conflicts with the claimant's statement made on August 2, 1982 on Form IB-11,

Self-Employment Questionnaire, on which the claimant reported that he had not previously worked full time in other employment while being self-employed, that he was devoting full time to his business on a daily basis and that he would drop self-employment for other full time work only for an equivalent earning. In the face of such conflicting evidence, the Appeal Referee and the Board of Review are not compelled to act upon plaintiff's unsworn claim forms in view of the fact that many questions could have been answered had the plaintiff seen fit to appear at the hearing. Stumph v. Gronning et. al, Utah Supreme Court, Case No. 15662, filed September 29, 1978.

This decision will become final ten days after the date of mailing hereof, and any further appeal must be made directly with the Utah Supreme Court at the State Capitol Building, Salt Lake City, Utah, within ten days after this decision becomes final. To file an appeal with the Supreme Court you must submit

to the Clerk of the Court a Petition for Writ of Review pursuant to Section 35-4-10(i) of the Utah Employment Security Act.

BOARD OF REVIEW

(SGD) Stephen M. Hadley
(SGD) James F. Hannan
(SGD) Richard H. Schone

Dated this 14th day of December, 1982

Date mailed: December 21, 1982

Appendix

IN THE SUPREME COURT OF THE STATE OF UTAH

CARLOS L. JIMENA,
Plaintiff-Appellant,

v.

BOARD OF REVIEW, ET. AL.
Defendants-Respondents

MOTION AND ORDER FOR EX-PARTE EXTENSION OF TIME WITHIN WHICH TO SUBMIT THE DEFENDANT'S BRIEF

Case No. 18901

TO THE SUPREME COURT OF THE STATE OF UTAH AND THE HONORABLE JUSTICES THEREOF:

COMES NOW the Defendant, the Industrial Commission of Utah, Department of Employment Security, and respectfully moves the Court for an ex parte extension of time within which to submit the Defendant's Brief in the above-entitled cause of action, on the basis of a breakdown in the printing equipment of the Defendant. The Brief was originally due on March 21, 1983.

Therefore, pursuant to Rule 76(f), Utah Rules of Civil Procedure, the Defendant requests an ex parte extension of two weeks, to and including March 25, 1983, in which to submit Defendant's Brief.

Dated this 21st day of March, 1983.

(SGD) K. ALLAN ZABEL
Attorney for Defendant

Appendix

IN THE SUPREME COURT OF THE STATE OF UTAH

CARLOS L. JIMENA,
Plaintiff-Appellant,

v.

Supreme Court No. 18901

DEPARTMENT OF EMPLOYMENT SECURITY, ET.AL.,
Defendant-Respondents.

OPPOSITION TO MOTION FOR EXTENSION OF TIME TO FILE BRIEF REQUESTED BY RESPONDENTS AND MOTION TO STRIKE OUT THEIR BRIEF, IF ANY IS FILED

COMES NOW Appellant, thru himself as counsel, and before this Honorable Supreme Court respectfully states:

1. That on March 23, 1983 appellant received a copy of respondents ex-parte motion dated March 21, 1983 to extend the one month period within which they will file their brief;

2. That respondents motion for extension of time to file their brief is misleading to this Honorable Supreme Court because there was no more time to extend as will be pointed out hereinafter;

3. That appellant's mailing certificate (p. 27 of his brief) shows that he mailed two

copies of his brief to each of the respondents on February 18, 1983; that in accordance with the Rules appellant mailed his brief directly to respondents because no attorney entered his appearance on their behalf; that on the same date of mailing appellant completed the service of his brief on respondents.

> "Service upon.. a party shall be made by mailing it to him at his known address... Service by mail is complete upon mailing." (Utah Rules of Civil Procedure, Rule 5,b,1)

4. That Rule 75(p)(1), Utah Rules of Civl Procedure states that respondents shall file their brief "Within one month after the service upon him of appellant's brief,xxx;" that the meaning of "month" as used in the Rules is calendar month as held by this Honorable Supreme Court in the following cases:

"One month is a calendar month not a lunar month of 28 days, nor is it necessarily 30 days. Such a month commences at the beginning of the day of the month on which it starts and ends at the expiration of the day before the same day of the next month. Thus a month which starts with the beginning of the first day of a calendar month would end at the end of the last day of such month, and not at the last end of the first day of the next month. If the month in question commenced on a day

other than the first day of such month, such as at the beginning of the 23rd day of such month, it would end at the expiration of the 22nd day of the next month and not at the expiration of the 23rd day of the next month, which would be the beginning of another month. In the present case we exclude from our calculation the day of the act or event after which the designated period of time begins to run, which is NOvember 22 the day on which the motion was overruled, and start counting from the beginning of the 23rd of that month; from that time one month would end at the expiration of the 22nd day of December, or just before the 23rd commenced, which marked the beginning of another month." (In re Lynch's Estate, Utah 1953, 254 P.2d 454-455, 123 Utah 57; followed and quoted in Anderson v. Anderson, Utah 1955, 282 P.2d 845, 3 Utah 2d 277)(underscoring mine)

5. That following the aforecited cases, February 18, 1983 the day appellant completed the service of his brief on respondents by mailing it to them, is the event after which the designated period begins to run. From that time one month would end at the expiration of the 18th day of March 1983, or just before the 19th commenced, which marked the beginning of another month.

6. That therefore, respondents motion for extension of time having been filed on March 21, 1983 was three days late and there was no more time to extend.

7. That it is expected that litigants should follow the rules;

"Although the New Rules of Civil Procedure were intended to provide liberality in procedure, it is nevertheless expected that they will be followed, and unless reasons satisfactory to the court are advanced as a basis for relief from complying with them, parties will not be excused from so doing."(Nunley v. Stan Katz Real Estate, Inc.,1964, 388 P.2d 798,801, 15 Utah 2d 126; Holton v. Holton, Utah 1952, 243 P.2d 438, 439; Anderson v. Anderson 1955, 282 P.2d 845, 848, 3 Utah 2d 277)

8. That in the event respondents already filed their brief, the same should be ordered stricken out as having been filed out of time.

WHEREFORE, it is respectfully prayed that no extension of time to file brief be granted to respondents; that if an extension of time was granted the same be ordered revoked; that if any brief was filed by any or both respondents, it is likewise prayed that they be ordered stricken out of the record and that this case be declared submitted for decision. Other equitable relief is prayed for.

Portland, Oregon for Salt Lake City,Utah March 23, 1983.

(SGD)CARLOS L. JIMENA
Petitioner
(address ommitted)

Appendix

IN THE SUPREME COURT OF THE STATE OF UTAH

Regular February Term, 1983 April 11, 1983

Carlos L. Jimena,
Plaintiff,

v.

MINUTE ENTRY
No. 18901

The Industrial Commission
of Utah, Department of
Employment Security,
Defendant.

Defendant's ex-parte motion for an extension of time to file defendant's brief, up to and including March 25, 1983, is granted in accordance with Rule 76 (f), Utah Rules of Civil Procedure.

Plaintiff's motion for an order removing defendant's brief from the record is denied.

(no name of Justice)